

[*Patrick v. Public Service Electric & Gas Co.*](#), 1998-ERA-39 (ALJ Mar. 4, 1999)

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U.S. Department of Labor
Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, New Jersey 08104

DATE: March 4, 1999

CASE NO: 1998-ERA-39

TERRY PATRICK
Complainant

v.

PUBLIC SERVICE ELECTRIC & GAS CO.
Respondent

Appearances:

Gilbert W. Bates, Esq.
For Complainant

Hope M. Pomerantz, Esq.
Jeffrie Keenan, Esq.
For Respondent

Before: PAUL H. TEITLER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (the "ERA" or the "Act"). The Act protects employees who assist or participate in actions to carry out the purposes of the federal statutes

regulating the nuclear energy industry. The Act provides, *inter alia*, that "no employer may discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. §2011, et seq.)." 42 U.S.C. §5851(a)(1)(A). The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission (the "NRC") who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

The claim in the instant case is brought by Terry Patrick ("Complainant") against his employer, Public Service Electric & Gas Company ("Employer" or "Respondent"). A hearing was held before me in Camden, New Jersey between October 14 and 20, 1998.¹ The parties were afforded a full opportunity to adduce testimony, offer evidence and submit post-hearing briefs. Complainant and Respondent filed briefs on January 29, 1999.

This case arises out of a series of events which occurred between March of 1997 and March of 1998. Complainant contends that because he displayed a "questioning attitude" by reporting safety concerns and refusing to sign procedures he had not performed, Employer subjected him to adverse employment actions, including unnecessary factfinders², coaching and counseling sessions³ which resulted in memos to his file, suspension of his access to the plant pending psychological evaluation, and eventually, reassignment to the valve team. Respondent contends that Complainant did not raise safety concerns and therefore did not engage in "protected activity" under the Act. Additionally, Respondent contends that it did not subject Complainant to any adverse employment action or retaliatory harassment because he engaged in protected activity under the Act.

ISSUES TO BE RESOLVED

1. Whether the Complainant engaged in protected activity under the Act;
2. Whether the Respondent discriminated against Complainant because he engaged in activities that are protected under the Act; and
3. What damages, if any, the Complainant is entitled to.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of the Evidence

Terry Patrick is currently employed by PSE&G at its Salem, New Jersey facility, where he has worked since March 1995. (TX 1 at 41). Mr. Patrick is an experienced nuclear mechanical technician with eight to ten years of experience in the field. (TX 1 at 41). In 1996, PSE&G set up a Maintenance Intervention program to retrain its workers, which Mr. Patrick attended. (TX 1 at 43, TX 3 at 589). At the Intervention, employees were

taught to use the STAR principle: Stop, Think, Act, Review. (TX 1 at 46). Employees were told that if something at the plant did not seem right, they should stop, and think about the problem, then either act on the problem or review it with a supervisor. (TX 1 at 46). Additionally, employees were encouraged to have a "questioning attitude" regarding plant operations and to take responsibility for their work. (TX 1 at 47).

After the Intervention, a series of incidents involving Mr. Patrick occurred. These incidents form the basis of Complainant's claim. Below is a summary of the facts surrounding each incident..

The Torqueing Incident

The first incident occurred in March of 1997, after Mr. Patrick returned from the Intervention, when Mr. Patrick was approached by a fellow employee, Steven Zupko. (TX 1 at 48). Steven Zupko told Mr. Patrick that Bob Vander Decker, a plant supervisor, wanted Mr. Patrick to sign a step in a procedure (the torqueing of a valve) which Mr. Zupko had performed. Mr. Zupko told Mr. Patrick that Mr. Vander Decker didn't think that Mr. Zupko was qualified to perform the step, because he was not valve qualified. (TX 1 at 48-49). Mr. Patrick refused to sign the step, and told Mr. Zupko that it was not necessary to be valve qualified to perform the step, as long as he was torque qualified. (TX 1 at 50). Both employees discussed the issue with Bob Vander Decker, and the situation was eventually resolved without Mr. Patrick signing the step in the procedure. (TX 1 at 61). Mr. Patrick testified at the hearing that he did not sign the procedure because he felt that it would be a violation of company policy and a falsification of nuclear document to sign a step that he did not perform. (TX 1 at 61).

The Initialing Incident

Several days later, on March 6, 1997, Mr. Patrick was filling out a procedure form. (TX 1 at 62). At this time, it was Mr. Patrick's understanding that if a step in a procedure was a conditional step⁴ which the technician

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determined was not necessary, the technician should mark the step "N/A," and initial and date the step. (TX 1 at 62). Mr. Patrick marked several steps in the procedure he was working on "N/A." (TX 1 at 62-63). Shortly thereafter, a new rule was instituted requiring employees to include a reason for marking any step "N/A." (TX 1 at 64). Several weeks later, Mr. Patrick was assigned a job by Mr. Vander Decker. (TX 1 at 64). When he reviewed the procedure, he found that several steps in the procedure had already been marked "N/A;" however, they had not been signed or dated and no reason had been provided. (TX 1 at 64). Mr. Patrick apprised Mr. Vander Decker of the situation, who told him to just go ahead and do the procedure. (TX 1 at 65). Mr. Patrick testified that when he reminded Mr. Vander Decker of the new policy, Mr. Vander Decker told him that he did not like the tone of his voice. (TX 1 at 65).

The Smoking Incident

A few days later on March 10, 1997, Mr. Patrick and a co-worker, Jack Van Nimviggen, went outside to smoke a cigarette. (TX 1 at 66). As it was raining, they stood underneath a small overhang behind the maintenance shop. (TX 1 at 66). Mr. Patrick testified that workers often smoked there when it was raining. (TX 1 at 66). Mr. Vander Decker came outside and confronted them, saying "I hope you guys aren't smoking here." (TX 1 at 66). When Mr. Patrick said that they were, Mr. Vander Decker told him to move to an uncovered area across the street, but allowed Mr. Patrick's co-worker to remain where he was while he finished his cigarette. (TX 1 at 67).

The Hood Incident

The next day, March 11, 1997, Mr. Patrick and three other men were working in a contained area. (TX 1 at 67). Mr. Patrick was working in an area with limited room, and was wearing a protective hood. (TX 1 at 67-68). Mr. Vander Decker approached and asked Mr. Patrick why he was wearing a hood and the other workers were not. (TX 1 at 68). Mr. Patrick explained that he was wearing the hood because he wanted to ensure that he did not get contaminated, as he was working closer to the pipes than the other workers. (TX 1 at 68). Mr. Patrick testified that Mr. Vander Decker replied "so you got three guys abiding by the rules and you have one asshole."⁵ (TX 1 at 68).

The DIMS Terminal Incident

On July 27, 1997, Mr. Patrick was working at a DIMS computer terminal. (TX 1 at 71). As part of his job, he used the terminal to confirm that necessary parts were available for his assignments and to confirm that his procedures were up to date. (TX 1 at 71). On this particular day, he had been told by Warren Mason, his immediate supervisor, not to begin his

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assigned work because he was not yet "on tags."⁶ (TX 1 at 71). While waiting for clearance from his supervisor to begin work, Mr. Patrick staged his tools for the job, verified the work order, and then returned to the DIMS terminal to check the procedures. (TX 1 at 72).

While Mr. Patrick was working at the terminal, Mr. Vander Decker approached and asked Mr. Patrick what he was doing. (TX 1 at 73). Mr. Patrick testified that when he informed Mr. Vander Decker that he was reviewing his procedures, Mr. Vander Decker began to ask him questions about his work order. (TX 1 at 74-75). Mr. Patrick tried to ignore him, but Mr. Vander Decker continued to question him. (TX 1 at 75). Eventually, Mr. Patrick got up from the terminal and walked to the front of the shop where a co-worker was standing. (TX 1 at 75). Mr. Vander Decker followed him and continued to question him. (TX 1 at 76). When Mr. Patrick refused to answer him, Mr. Vander Decker

asked him to take a walk. (TX 1 at 77). At that point, Mr. Patrick stated that he wanted union representation. (TX 1 at 77). Mr. Vander Decker dropped the issue and left. (TX 1 at 77).

Several employees who witnessed the DIMS Terminal Incident testified regarding their impressions of the incident. For example, John Burnell testified that when Mr. Vander Decker asked Mr. Patrick to take a walk, he thought that "there's going to be more than just yelling at him." (TX 2 at 10). Mr. Burnell also testified that Mr. Patrick was behaving with restraint during the incident. (TX 2 at 11). Similarly, Brian Smick testified that Mr. Patrick was "agitated, but he was under control." (TX 2 at 74). Finally, Jim Doeblar testified that Mr. Vander Decker was "badgering" Mr. Patrick. (TX 2 at 148).

As a result of the DIMS terminal incident, Mr. Patrick met with his supervisor, Warren Mason, his shop steward, Jim Doeblar, and his superintendent, Ken Rollins. (TX 1 at 77-78). Shortly thereafter, he attended a factfinder with Warren Mason, Jim Doeblar, Ken Rollins, and Mr. Vander Decker. (TX 1 at 78). As a result of the factfinder, Mr. Patrick was coached and counseled about his refusal to take a walk with Mr. Vander Decker. (TX 1 at 79). Additionally, a letter was placed in his file, stating that he should follow management expectations and answer supervisor's questions in a professional manner, and that if a supervisor asks him to take a walk with him, he should do so. (TX 1 at 79).

The Shop Clean-Up Day Incident

On October 15, 1997, Mr. Patrick was working with air system valves. (TX 1 at 84). He was grinding and beveling pipe. (TX 1 at 84). Sometime between 4:30 and 5:30, he heard other employees making a lot of noise. (TX 1 at 86). Mr. Patrick testified that he didn't feel

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safe grinding amidst the commotion, so he stopped his job and secured his job site. (TX 1 at 87). He explained what happened next:

As I walked out of the flash screen area a supervisor passed by me. You see that down there. This big pile of stuff was on the floor, I mean, there was valves in there, pump shanks, motor shanks and all kinds of stuff. Paint cans, toolboxes. You name it. People were screaming around the shop throw it away, throw it away, you know. I didn't know at this particular time what they was doing.

(TX 1 at 87). Mr. Patrick, as well as other employees, testified that the shop was in a state of chaos.⁷ Mr. Patrick later learned that it was a shop clean-up day because they had received an NAP 18 violation.⁸ (TX 1 at 88). He also testified that the pile of items included new items, such as a usable toolbox. Mr. Patrick began to throw things away, as the other workers were doing. (TX 1 at 90). He threw out two pipe rollers, which were in the pile. (TX 1 at 90). As he did so, another co-worker approached him and told him not

to throw out the pipe rollers, because they weren't bad. (TX 1 at 90). The co-worker removed the pipe rollers from the dumpster and placed them in another part of the shop. (TX 1 at 90).

At that point, Mr. Patrick took his work order to his supervisor, Dan Brown, and explained that he had secured his job because of the noise. (TX 1 at 91). He told his supervisor that he was unable to stay to clean up the shop because he had to pick up his children. (TX 1 at 91). At that point, his supervisor informed him that another factfinder was going to be held regarding the pipe rollers. (TX 1 at 91). The factfinder lasted approximately fifteen minutes, because Mr. Patrick needed to leave to pick up his children. (TX 1 at 92). A second factfinder was held on October 21, regarding the piperoller incident. (TX 1 at 97). As a result of those two factfinders, Mr. Patrick was coached and counseled on December 24, 1997, and a letter was placed in his file. (TX 1 at 98). The letter stated:

On October 15, 1997, you were assigned a job in the maintenance shop preparing the Air Removal piping ends under Work Order #970508125. You were observed away from your assigned work area and were observed disposing of two good conditioned shop roller stands, without being directed to do so. You provided no acceptable explanation for your actions.

A review of your employment record reveals that you were counseled on July 30, 1997, for a failure to follow a supervisor's direction. You were told at that time that such behaviors were unacceptable.

This Oral Reminder is being issued to impress upon you the need to perform the work to which you are assigned and you are advised that similar issues or further failure to meet departmental standards will result in further administrative action.

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This memo will serve to confirm the issuance of an Oral Reminder to Terry Patrick on December 24, 1997. In attendance at the meeting was: Charles Tomczak, David Mullen, Terry Patrick and Dan Brown.
(CX 1).

The Action Request Incident

In October, after the shop clean-up day incident, Mr. Patrick drafted a series of three Action Requests,⁹ ("AR") which alleged that Mr. Patrick was being subjected to discrimination and harassment in violation of corporate policy and relevant law. All three Action Requests were remarkably similar, and all included the following statement: "THE TECHNICIAN IN QUESTION IS ON MANY MEDICATIONS, BECAUSE OF THIS HARASSMENT PROBLEM, BUT STILL CONTINUES TO BE HARASSED AND DISCRIMINATED AGAINST, AND COULD CAUSE THE TECHNICIAN TO BE UNFOCUSED ON TASKS AT HAND." (CX 2, RX 1, RX 2).

The next morning, one of the supervisors brought one of the AR's to the attention of Ken Rollins. (TX 3 at 572). Mr. Rollins found the AR disturbing for several reasons. First, Mr. Patrick had not asked his supervisor to review the AR after he entered it into the system, in violation of company policy. (TX 3 at 572). Second, all three AR's contained the substantially the same information. (TX 3 at 572). Third, the AR's indicated that Mr. Patrick could be unable to focus on his work. (TX 3 at 572). Mr. Rollins testified that he was particularly disturbed by this because Mr. Patrick had unescorted access through the plant, and worked independently on safety- related equipment. (TX 3 at 613). Therefore, according to company policy,¹⁰ Mr. Rollins consulted with several supervisors, two doctors, a manager, and at least one HR representative, and a consensus decision was reached to temporarily suspend Mr. Patrick's access to the plant. (TX 3 at 574; 616). The next day, Ken Rollins called Mr. Patrick at home and told him to report to medical the next morning rather than to work. (TX 1 at 109). When Mr. Patrick reported to medical the next day, he underwent psychological evaluation. (TX 1 at 109). While his evaluation was pending, Mr. Patrick was given another assignment outside the protected area so that he could continue to be productive, and he was paid for every day while his access was suspended. (TX 3 at 575). Eventually, after evaluation, he was cleared to return to the site. (TX 3 at 575).

The 11 MS 46 Valve Incident

On March 26, 1998, Mr. Patrick was assigned to work on the 11 MS 46 valve. (TX 1 at 113). The 11 MS 46 valve is a safety-related valve that is a bypass from one steam generator feed pump to the next steam generator feed pump.¹¹ (TX 1 at 113). The previous day, the valve failed its normal surveillance

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because it would not open properly and appeared to be binding. (TX 3 at 720). Once the valve failed the surveillance, an action request was generated and the plant entered a 72-hour action statement.¹²

Hugh McStay, the supervisor, assigned Mr. Patrick and a co-worker, Kent Waters, to repack the valve and ascertain why the valve was sticking. (TX 3 at 722). Mr. Patrick unpacked the valve, and noted that the valve cycled 100% open and 100% closed when the valve was fully unpacked. (TX 1 at 115). Therefore, he concluded that the packing configuration of the valve was causing it to stick. (TX 1 at 115). Specifically, Mr. Patrick observed that the valve was packed with six layers of graphite packing, and it appeared that the graphite was intruding and interfering with the proper operation of the valve. (TX 1 at 115-116).

At that point, Mr. Patrick notified his supervisor, Hugh McStay, of his findings. (TX 1 at 116). Mr. McStay told him to notify engineering and find out if they wanted to design a new packing arrangement for the valve. (TX 1 at 116). Mr. Patrick notified Nathan Vetsman, who told him that he would try to reach Mr. Coleman, a member of the Valve

Engineering Team. (TX 3 at 728). Both Mr. Patrick and Mr. McStay testified that they planned to wait until they received a response from Mr. Coleman. (TX 1 at 119, TX 3 at 727). While he was waiting for a response, Mr. Patrick saw Mr. Rollins, who inquired about the status of the job. (TX 1 at 119). Mr. Patrick explained the situation to Mr. Rollins. (TX 1 at 120). Mr. Rollins instructed him to check the Bill of Materials¹³ for the valve to ensure that he had the correct materials. (TX 3 at 524-525). He also told him to check the three sister valves and ensure that the Bill of Materials for those valves matched the Bill of Materials for this valve. (TX 3 at 525). Finally, Mr. Rollins instructed him to check the manual and any other available vendor information to see if wiper rings hadn't previously been removed from the packing configuration. (TX 3 at 525). He instructed Mr. Patrick that if the materials matched the Bill of Materials, then he should repack the valve according to the work order, in parallel with Engineering considering the situation. (TX 3 at 526).

Mr. Patrick testified that he disagreed with Mr. Rollins' instructions, because he didn't feel that repacking the valve was the "right thing to do." (TX 1 at 120). However, he testified that he since he had already been reprimanded for insubordination, he decided to follow Mr. Rollins' instructions. (TX 1 at 120). After Mr. Patrick repacked the valve, it would cycle open, but would not fully close unless he stroked it by hand. (TX 1 at 120). Mr. Patrick testified that this was not in accordance with the criteria for the valve, which indicated that the valve should not bind. (TX 1 at 120). Therefore, Mr. Patrick marked "unsatisfactory" on the procedure, and stopped the procedure at that step. (TX 1 at 120). In the space on the work order labeled "Description of Work Performed," Mr. Patrick wrote:

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Reviewed W.O. & Procedure, verified component by I.D. lable (sic) 11 MS 46, was directed by Supervisor (Hugh McStay) to just repack and check cycling of valve after packing was removed.. (Valve cycled sat.). Tried to contact engineering to change packing stack to install wiper @ the bottom & top of stuffing box thus reducing the oversealing of the stem and not allowing foreign material into the system, i.e. (Grafoil packing going by metal stem bushing) and trying to maintain scope of the M-Rule - fixing right the first time - but this was overrode by Ken Rollins who told me to just pack it cause were in 72 hr action statement. I tried to explain to him (Ken Rollins) the problem but to no avail. Repacked the valve with six rings only to get full thread engagement of gland nuts reassembled counterweight & nut, cotter pin & found valve not resealing. Valve lifted off seat & 23 ft. Lbs of torque but still would not return to closed position after torque wrench was removed even with the aid of the counter weight. Valve is not functioning at this present time as designed; and no torque is on packing.

(CX 3) Mr. Patrick presented the work order summary to his supervisor, Hugh McStay. (TX 1 at 132). Mr. McStay reviewed the comments, and told Mr. Patrick that some of the comments were not professional. (TX 3 at 729). Specifically, Mr. McStay told Mr. Patrick that he should not include names and badge numbers in the work order. (TX 3 at

730). Mr. McStay testified, however, that he did not require Mr. Patrick to rewrite the work order because Mr. Patrick had valid concerns about the valve. (TX 3 at 731). Mr. McStay signed off on the work order and instructed Mr. Patrick to take it to the work control center for sign off. (TX 3 at 732). Mr. Patrick took the work order to the work control center, where it was reviewed by a shift control supervisor. (TX 1 at 137). After the shift supervisor reviewed it, he notified Ken Rollins and Mike Quartz, the Operations Superintendent. (TX 3 at 529). Mr. Rollins testified that Mr. Quartz was upset about the work order because it was against protocol to return a work order with known deficiencies to the Operations Department¹⁴. (TX 3 at 533). Mr. Rollins also testified that he was shocked when he read the work order summary because he did not feel that it was an accurate representation of the events that had taken place. (TX 3 at 535).

After reviewing the work order, Mr. Rollins and Mr. McStay met with Mr. Patrick to discuss the issue. (TX 3 at 544). Mr. Patrick testified regarding the meeting:

When Rollins came out it appeared he was extremely upset, red-faced, come right through the briefing room there, the meeting room, and told me, let's go. Let's take a walk. I said wait a minute, can I have I need union representation. He told me, no, you'll get what you get when I see fit that you need it. Follow me. There again I have to follow him because I have this thing in my file, you know. I can't go and call the shop steward and say, hey, they're giving me flack again. I've got to follow them. I followed him into a back room there inside the control room. Go back there and he starts cursing at me. This shit's going to stop. None of this and none of that and pointing at the work order. At that point I backed up and I said, look, for the second time I'm requesting union representation. No, and he proceeded to read right into the work order. Telling Hugh McStay as to when, you know, it'll take an act of God to get this thing signed off and get it to it that it's satisfactory now and I'm like, well, you know, why don't we just stop and fix it right the first time. Go through the motions and fix it right like we're told in the intervention.

(TX 1 at 137-138). After the meeting, Mr. Patrick, Mr. McStay, and Mr. Rollins and Mr. Coleman,

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the valve engineer went to the location of the valve. (TX 3 at 545). Mr. Rollins and Mr. Patrick went up on the scaffolding and stroked the valve, while Mr. McStay and Mr. Coleman remained on the ground. (TX 3 at 734). The first time the valve was opened, it did not close fully on its own. (TX 3 at 734). After the valve was cycled several times, however, the valve closed by itself. (TX 3 at 735). They then waited a few minutes and opened the valve, and once again the valve did not close fully on its own. (TX 3 at 735). A discussion ensued over whether this situation was acceptable. (TX 3 at 548). Mr. Coleman, the valve engineer, stated that when the valve was in service, the steam would

lubricate the valve and the friction from the packing material would not cause the valve to stick. (TX 3 at 549). Mr. McStay added the following comments to the work order:

Valve was cycled several times with minimal resistance on the valve shaft. Kept the valve in the partial open position. Torque on the packing is finger tight which is acceptable for this valve under no load condition. Valve packing to be adjusted under Act 8 under NOP/NOT. Eng (valve has concurred that this valve is repacked correctly & that the current situation with valve resistance is acceptable and expected under no load conditions.

(CX 3). Mr. McStay returned the revised work order to the shift supervisor, and the work order was closed. (TX 742). After the 11 MS 46 valve incident, Mr. Patrick drafted an AR recommending changes to the valve's packing design. (TX 3 at 743). Eventually, Engineering enhanced the valve packing design to eliminate the friction caused by the packing. (TX Coleman¹⁵ at 17-18).

Thereafter, Complainant received a performance appraisal dated April 8, 1998. (CX 4). The section labeled judgment was rated below standards. (CX 4). The following comments were written:

On 12-24-97 Terry was issued an oral reminder for taking inappropriate action disposing of two good conditioned shop roller stands. On 3-26-98 Terry was coached for lack of professionalism regarding W.O. 961127008(7) on the 11 MS 45 packing replacement.

It is our expectation to properly document disposition of work performed on the W.O.'s without writing personal feelings. This type of behavior is unprofessional & unacceptable. I'm requesting no further incidents of this type occur again.

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Similar comments and a below average rating was found on the section labeled Interpersonal Skills. (CX 4).

Recently, Complainant was transferred from the maintenance shop to the valve team. (TX 1 at 146). He testified that he has not had any problems with his new supervisor. (TX 1 at 146). He also testified that his supervisor, John Fairfull told him that Kenny Rollins has contacted him and said that Mr. Patrick is a troublemaker. (TX 1 at 148). He has not, however, recently had any assignments where Mr. Vander Decker or Mr. Rollins was his direct supervisor. (TX 1 at 230).

Complainant also testified about a recent issue which arose regarding sick time. His supervisor, Rich Keenan had been out of work with a back injury¹⁶, and he was assigned to a project under the supervision of Bob Vander Decker. (TX 1 at 149). The next day, he awoke feeling sick and called Rich Keenan's number and left a voice mail that he would be out sick. (TX 1 at 149). Later that morning, Bob Vander Decker called him at home, and said that his message had been vague. (TX 1 at 150). Mr. Patrick reiterated that he

was sick and would not be able to report to work that day. (TX 1 at 150). When Mr. Patrick received his next paycheck, it was eight hours short. (TX 1 at 150). Complainant told his shop steward, and a factfinder was held to determine whether Complainant had violated shop rules by leaving a voice mail message.¹⁷ (TX 1 at 150).

Discussion

1. Whether Complainant Engaged in Protected Activity

The initial question to be resolved is whether any of the incidents which occurred between March of 1997 and March of 1998 constituted protected activity under the ERA. Complainant's brief identifies four incidents which Complainant contends constitute protected activity. First, Complainant alleges that his refusal to sign off on work that he had not performed was protected activity (*The Torquing Qualification Incident*). Second, Complainant alleges that his refusal to accept the notation of certain procedural steps as N/A was protected activity. (*The Initialing Incident*). Third, Complainant alleges that his refusal to begin work that was unauthorized due to the fact that the proper tagging procedure was not yet complete was protected activity. (*The DIMS Terminal Incident*). Finally, Complainant alleges that the comments that he included in the 11 MS 46 valve work order were protected activity. (*The 11 MS 46 Valve Incident*).¹⁸

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Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear statutes. S. KOHN, *THE WHISTLEBLOWER LITIGATION HANDBOOK*. 35-47 (1990). In order to establish a *prima facie* case of discrimination under the ERA, a complainant's charge must relate to some aspect of nuclear safety. *Decresci v. Lukens*, 97-ERA-15 (Sec'y Dec. 16, 1993). In *Jarvis v. Battelle Pacific NW Laboratory*, 97-ERA-15 (ARB Aug. 27, 1998), the Administrative Review Board (the "ARB") held that "[t]he protection afforded whistle-blowers by the ERA extends to employees who, in the course of their work, must make recommendations regarding how best to serve the interest of nuclear safety, even when they do not allege that the *status quo* is in violation of any specific statutory or regulatory standard."

Despite the generally broad application of §5851, courts and the Secretary have held that the ERA protects only certain types of acts. First, an employee must in some way communicate or report the safety concern, either by internal complaint or by complaint to an outside entity or authority. *See Dobrewenaski v. Associated Universities, Inc.*, 96-ERA-44 (ARB June 18, 1998); *see also Scerbo v. Consolidated Edison Co. of New York, Inc.*, 89-CAA-2 (Sec'y Nov. 13, 1992); *Conley v. McClellan Air Force Base*, 84-WPC-1 (Sec'y Sept. 7, 1993); *Francis v. Bogan, Inc.*, 86-ERA-8 (Sec'y Apr. 1, 1988) (the employer must know about the protected activity for the complaint to be actionable.). Second, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995).

The Torquing Qualification Incident

Complainant contends that the torquing qualification incident constituted protected activity under the ERA. Specifically, Complainant argues that the need to follow proper procedural steps and comply with NRC documentation requirements is a safety-related activity, since it applies to both safety-related and non-safety-related jobs. The argument made by Complainant is similar to the argument made by the complainant in *Durham v. Georgia Power Co.*, 86- ERA-9 (ALJ Oct. 24, 1986). In *Durham*, the complainant was inspecting the installation of Class 1E safety-related cables, and was unable to locate hold tags. He therefore wrote "No Hold Tags Found" in the "Hold Tag Removed By" block on the deviation report, then signed the bottom of the deviation report. When the Senior Inspector reviewed the deviation report, he requested that complainant date and sign the "Hold Tag Removed By" block on the deviation report, but Complainant refused to do so, contending that this would violate applicable procedures. Management explained to the complainant that the signature in the "Hold Tag Removed By" block under the notation "No Hold Tags Found"

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merely indicated there were no on site hold tags impeding further work. The Administrative Law Judge held that Complainant, after explanation, knew or should have known the requested signature would not violate applicable quality control procedures. *Durham*, 86-ERA-9 at 13. Additionally, the Administrative Law Judge rejected the complainant's argument that his refusal to sign the report was protected activity because the loss of the hold tags placed the integrity of the cable in question. The Administrative Law Judge found that the record supported a finding that Complainant refused to sign not because of concern pertaining to the cables' indeterminate integrity, but because he disagreed with management on the interpretation of procedures. *Durham*, 86-ERA-9 at 14.

The facts of the instant case lead to a similar conclusion. Complainant refusal to sign the procedure was not because he believed that the work had been performed by an individual without the proper qualifications. To the contrary, Complainant believed that Steven Zupko was qualified to perform the procedure. Accordingly, Complainant did not raise a safety- related question regarding the integrity of Mr. Zupko's work, rather, he questioned Mr. Vander Decker's understanding of the qualification requirements. This type of disagreement regarding procedure does not constitute protected activity under the Act.

The Initialing Incident

The legal reasoning which I applied in analyzing the torquing qualification incident applies similarly to the initialing incident. Complainant has failed to articulate any safety-related concern regarding the incident. Complainant merely testified that he considered the documentation step to be safety-related because "[i]t would be a violation of

procedure." (TX 1 at 65). Complainant has offered no evidence to support the conclusion that the steps marked "N/A" were safety-related in any way, or that failure to perform those steps could have safety-related consequences. Rather, the evidence indicates that Complainant's refusal was based on a disagreement regarding the appropriate procedure to be followed, specifically, whether he should accept the "N/A" notation where the notation had not been initialed and no reason had been provided. As discussed above, non-safety-related disagreements regarding procedure are not protected activity under the Act. Accordingly, I find that the initialing incident did not constitute protected activity.

The DIMS Terminal Incident

Next, Complainant alleges that the DIMS Terminal incident constituted protected activity under the Act. Specifically, Complainant alleges that his refusal to begin work until the tagging procedure was complete was protected activity. Upon review of the testimony given by both Complainant and Mr. Vander Decker regarding the incident, I find that Complainant was performing a safety-related function before Mr. Vander Decker approached him. Complainant has not established, however, that Mr. Vander Decker was aware of the safety-related function Complainant was performing. The parties provided divergent testimony on this issue. Complainant

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testified that he told Mr. Vander Decker that he was waiting to be "on tags." (TX 1 at 77). In contrast, Mr. Vander Decker testified that he had no way to know what Complainant was doing because Complainant ignored Mr. Vander Decker's questions. (TX 4 at 823).

Initially, I note that it is the Complainant's burden to establish a prima facie case. Moreover, I find Mr. Vander Decker's testimony to be more persuasive on this issue, because his testimony was corroborated by the testimony of other witnesses, who testified that Mr. Patrick ignored Mr. Vander Decker's repeated questions. Accordingly, based upon the testimony given by Mr. Patrick, Mr. Vander Decker, and the witnesses to the incident, as well as the history of confrontation between the two individuals, I find that the confrontation between Mr. Patrick and Mr. Vander Decker was based on interpersonal issues and was not related to the safety-related function Complainant was performing.

Complainant's brief argues that "[t]he following of proper Safety related procedures by Complainant and his right to insist that others do as well is a protected activity." However, Complainant does not offer, and I cannot find, a legal basis for this statement. A complainant does not engage in protected activity every time he follows a safety-related procedure. Rather, his refusal to work for safety-related reasons is protected activity *if* he articulates the safety-related reasons in support of his refusal. *See Joseph J. Macktal v. Brown and Root, Inc.*, 86-ERA-23 (ARB Jan. 6, 1983). As discussed above, Complainant has not shown that he articulated his safety-related reasons for his refusal to

work to Mr. Vander Decker. Based on the foregoing, I find that the DIMS Terminal incident did not constitute protected activity under the Act.

The 11 MS 46 Valve Incident

Next, Complainant contends that the 11 MS 46 Valve incident constitutes protected activity under the Act. Complainant argues that the 11 MS 46 valve is a safety-related valve which is critical to the safe operation of the plant. Therefore, Complainant contends that the comments which he included in the work order summary indicating that the valve did not operate according to the specifications was protected activity under the Act.

The evidence establishes that Complainant's dissatisfaction with the valve was safety-related. Complainant believed that the valve would not close properly due to the friction generated by the packing material. The deposition testimony of Mark Coleman, a valve engineer at PSE&G, clearly establishes that the valve is a safety-related valve, and that the proper operation of the valve is critical to the safe operation of the plant. Specifically, Mr. Coleman testified that if the valve failed to close properly when the plant was operational, a condition called "blowdown" could result, in which steam is discharged into the containment building. (TX Coleman at 21-22). Additionally, Hugh McStay testified that Complainant's concerns about

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the valve were valid. Accordingly, I find that Complainant's expression of his valid, safety-related concerns about the valve constitute protected activity under the Act.

I do not find the arguments raised in Employer's brief to be persuasive. Employer argues that Complainant did not express any dissatisfaction with the valve's condition when the valve was evaluated in the field. I note, however, that the team evaluation of the valve occurred after Complainant had completed and submitted the work order. Therefore, the argument raised by Employer is not relevant to whether the work order comments constituted protected activity. Employer also argues that Complainant's evaluation was not the last evaluation to be performed on the valve before it was declared operable and placed back into service. Similarly, this argument is not relevant to the issue of whether the work order comments constituted protected activity under the Act.

The comments expressing Complainant's dissatisfaction raised a specific safety concern, and therefore constitute a protected internal complaint pursuant to the Act. Accordingly, I must now consider whether Respondent's actions violated the act.

2. Whether Respondent's Acts Violated the ERA

To establish a *prima facie* case of retaliation or discriminatory motivation under the whistleblower provision invoked in this case, a complainant must show that (1) the complainant engaged in protected activity, (2) the employer was aware of that protected

activity, and (3) the employer took some adverse action against the complainant. The complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Zinn v. University of Missouri*, 93 ERA 34 and 36 (Sec'y Jan. 18, 1996); *Dartey v. Zack Co. Of Chicago*, 82 ERA 2 (Sec'y Apr. 25, 1983).

The only incident that I have found to constitute protected activity under the Act is the 11 MS 46 Valve Incident. Accordingly, I must now consider the adverse action which occurred after the Incident, and examine whether Complainant has presented evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. After Complainant submitted the 11 MS 46 valve work order to the work control center, four separate events occurred which I must consider. First, he was confronted by Mr. Rollins regarding the contents of the work order. Second, he received a negative performance appraisal. Third, he was transferred from the maintenance shop to the valve team. Finally, a factfinder was held regarding Complainant's phone message about sick time.

The evidence and testimony presented in this case are clearly sufficient to raise the inference that Mr. Rollins' confrontation and the negative performance appraisal were motivated, at least in part, by the protected activity. The confrontation was a direct result, and occurred

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immediately after, Complainant submitted the work order summary containing the protected statements. Similarly, the negative performance appraisal specifically referred to the work order summary and the statements contained therein. Based upon these facts, one can infer that the confrontation and negative performance appraisal were motivated by the comments included in the 11 MS 46 work order.

Employer offers other reasons which motivated the confrontation and performance appraisal. Employer argues that the comments included in the work order summary were unprofessional because they were not an accurate representation of the facts. It is appropriate to analyze Employer's argument under the dual motive analysis set forth in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). Under *Mt. Healthy*, once the plaintiff has shown that the protected activity "played a role" in the employer's decision, the burden shifts to the employer to persuade the court that it would have discharged the plaintiff even if the protected activity had not occurred. See *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984) (citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Mt. Healthy City School District v. Doyle*, 429 U.S.274, 287). The dual motive analysis requires Employer to bear the risk that the influence of legal and illegal motives cannot be separated. See *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984).

Employer argues that Mr. Rollins confronted Complainant about the work order because it was against normal procedure to return a work order with known deficiencies and because he felt that it was not an accurate representation of the facts. This testimony is substantiated by the testimony of Hugh McStay, who testified that the confrontation discussion included a review of the directions given to Mr. Patrick by Mr. Rollins. (TX 3 at 766). Complainant testified, however, that during the confrontation, Mr. Rollins stated that he was angry because "it'll take an act of God to get this thing signed off and get it to where it's satisfactory now." (TX 138). Moreover, the circumstances surrounding the incident support the conclusion that the confrontation was due to the protected statements. The nature of the 72-hour action statement placed time pressure on the workers to get the work order signed off so that the plant would not have to be shut down. Based on all the evidence, I find that Employer has not shown that Mr. Rollins would have confronted Complainant in an accusatory manner in the absence of the protected statements.

Employer also argues that Complainant's negative performance appraisal was caused by the "unprofessional" nature of the work order comments. Specifically, Employer argues that the work order summary contained Mr. Patrick's personal feelings about his supervisors. However, upon review of the work order summary, I find that Mr. Patrick merely noted that he was told to repack the valve by Mr. Rollins because they were in a 24-hour action statement. This was the essence of Mr. Patrick's complaint and is necessary and inseparable part of his protected statement. Therefore, I find that Employer has not shown that Complainant would have received the negative performance appraisal in the absence of the protected statements.

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Complainant argues that his transfer to the valve team was a retaliatory action. I find, however, that he has not offered any evidence to support this argument. Rather, it appears that his transfer to the valve team was part of an ameliorative effort on the part of PSE&G to remove Mr. Patrick from supervisors that he did not get along with. Therefore, I find Complainant has not offered sufficient evidence to raise the inference that his transfer to the valve team was motivated by his protected activity.

Finally, Mr. Patrick alleges that the factfinder which was held regarding the phone message that he left when he called out sick was motivated by his protected activity. Again, he offers no evidence to support this allegation, except to argue that he has received more factfinders than other employees. I note, however, that this pattern of Mr. Patrick receiving an inordinate number of factfinders had begun before the 11 MS 46 valve incident, and therefore I must conclude that this factfinder was another symptom of an ongoing personal problem between Mr. Patrick and Mr. Vander Decker, and was not related to his protected activity.

3. Damages

42 U.S.C. §5851(b)(2)(B) provides that once discrimination that is prohibited by the Act is found:

...the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay, terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with , the bringing of the complaint upon which the order was issued.

Compensatory Damages

Complainant seeks compensatory damages for the mental distress and anguish he suffered because of the harassment. Where a violation has been found, section 5851(b)(2)(B) of the Energy Reorganization Act permits the award of compensatory damages. *DeFord v. Secretary of Labor*, 700 F.2d 281, 288 (6th Cir. 1983); 29 C.F.R. § 24.6(2). Compensatory damages may be awarded for emotional pain and suffering and for mental anguish. *DeFord*, 700 F.2d at 283; *DeFord v. Tennessee Valley Auth.*, 81-ERA-1 (Sec'y Apr. 30, 1983). Thus, where appropriate, a complainant may recover for emotional stress and mental

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anguish that is the "proximate" result of the unlawful termination. *See Busche v. Burkee*, 649 F.2d 509, 519 n.13 (7th Cir. 1981). The complainant has the burden of proving the existence and magnitude of subjective injuries. *Busche v. Burkee*, 649 F.2d at 519. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991).

In the current case, Complainant has provided no specific evidence to establish that he suffered emotional distress or mental anguish as a result of the 11 MS 45 valve incident. Emotional distress cannot be presumed, and compensatory damages for mental and emotional distress cannot be awarded "without proof that such injury actually was caused." *Carey v. Piphus*, 435 U.S. 247, 263-4 (1978). As Complainant has failed to meet his burden on this issue, he cannot recover compensatory damages for emotional pain and suffering.

Expungement of Complainant's Record

As I have found that the negative performance appraisal which referred to the 11 MS 46 valve work order summary violated of the Act, it is appropriate as part of the "make whole" relief to order that all comments referring to the 11 MS 46 valve work order

summary be expunged from Complainant's employment record. Respondent shall also refrain from reference to this incident when providing employment reference concerning Complainant.

Lost Wages During Hearing

At the hearing, Complainant testified that he was not paid for the time that he spent at the hearing or attending his deposition in this case. (TX 1 at 152). As I have found that Respondent violated the Act, it is appropriate as part of the "make whole" relief to order Respondent to compensate Complainant for his lost wages for the time he spent at the hearing and deposition in this case.

Attorneys's Fees and Costs

As Complainant has successfully prosecuted his complaint, he is entitled to recover reasonably incurred attorneys' fees and costs. Given the limited recovery in this case, however, it is suggested that the parties schedule a conference with the undersigned Administrative Law Judge to discuss the issue of attorneys' fees and costs.

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RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED that Respondents be ordered to:

1. Compensate Complainant for lost wages during the time he spent at his deposition and at the hearing.
2. Expunge from Complainant's employment record any and all negative comments relating to the 11 MS 46 valve work order summary, and refrain from reference to this incident when providing employment reference concerning Complainant.
3. Pay to Complainant all costs and expenses, including attorney fees, reasonably incurred by him in connection with this proceeding. As discussed above, it is suggested that the parties schedule a conference with the undersigned Administrative Law Judge to discuss the issue of reasonable attorney's fees.

PAUL H. TEITLER
Administrative Law Judge

Dated: MARCH 4, 1999
Camden, New Jersey

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary, unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC

20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

¹ Due to an apparent error, the transcript pages are not numbered consecutively. Therefore, the transcripts will hereafter be referred to as follows: "TX 1" will refer to the transcript of October 14, 1998. "TX 2" will refer to the transcript of October 15, 1998, "TX 3" will refer to the transcript of October 19, 1998, and "TX 4" will refer to the transcript of October 20, 1998. Additionally, "CX" will designate Complainant's exhibits and "EX" will designate Employer's exhibits.

² A fact finder is a non- disciplinary meeting held to gather information about what occurred so that appropriate action can be taken. (TX 569-570).

³ A coaching and counseling session is a meeting between a supervisor and an employee in which the supervisor explains to the employee areas in which the employee needs improvement.

⁴ A conditional step is one which is only performed if it is required. (TX 1 at 62).

⁵ Mike Feters, who was working in the containment area with Mr. Patrick at the time of this incident, testified that he did not remember Mr. Vander Decker making any comments after asking Mr. Patrick why he was wearing the protective hood.

⁶ Before beginning the maintenance work to which Complainant was assigned, it was necessary to tag certain components around the component being worked on to ensure that the component would not function. (TX 1 at 71).

⁷ For example, Jim Doeblter testified that he witnessed thousands of dollars worth of usable parts being thrown in the dumpster. (TX 2 at 155). According to Mr. Doeblter, the shop was in a state of mass confusion. (TX 2 at 155).

⁸ An NAP 18 violation is issued when items are missing the necessary background paperwork, such as work order tags. (TX 1 at 88).

⁹ An Action Request is a method used by employees at the plant to identify an issue that needs resolution or a condition adverse to quality. (TX 3 at 624).

¹⁰ Charles Corbett, a Maintenance Supervisor at the Salem facility, testified that the decision to suspend Mr. Patrick's access to the plant was made due to concerns about Terry's personal safety, his co-worker's safety, and plant safety. (TX 2 at 198-99). He also testified that the decision was in accordance with company policy. (TX 2 at 198).

¹¹ Mark Coleman, a member of the Valve Engineering Team, testified at his deposition on October 2, 1998 that if there were a pipe break upstream of the valve and the valve failed to operate, steam would be discharged into the building, an accident condition which has not been analyzed. (Coleman 22-23).

¹² Under the 72 hour action statement, if the condition was not repaired within 72 hours, the plant would have to shut down. (TX 3 at 721).

¹³ The Bill of Materials (BOM) is the list of approved materials for a safety-related component.

¹⁴ The proper procedure would be to draft a deficiency report (DR), which would then be evaluated by engineering. Engineering would then determine if the component could be approved for a "use as is" disposition. (TX 3 at 533-534).

¹⁵ "TX Coleman" refers to the transcript of the deposition of Mark Coleman taken on October 2, 1998.

¹⁶ Mr. Patrick testified that Rich Keenan had been out of work for several days. (TX 1 at 149). Mr. Rollins testified that Rich Keenan had been out of work for over two weeks with no return date in sight. (TX 3 at 694).

¹⁷ The Shop Rules stated that:

If you are unable to report for work at your scheduled start time, you must speak person-to-person with your supervisor. If your supervisor is unavailable, use his beeper number. If you still cannot reach your supervisor, contact another supervisor in your department to report your unscheduled absence. If after repeated attempts, you fail to reach a supervisor in your department person-to-person, contact the 12- hour shift maintenance supervisor at beeper 573-0304. (See attached Mechanical Maintenance phone list.)

(RX 3).

¹⁸ Complainant's brief does not argue that the Action Request Incident constituted protected activity, and accordingly, I do not address the issue in this Decision. However, even if the Action Request Incident did constitute protected activity, the management response (the suspension of Complainant's access to the plant) was reasonable and did not constitute retribution, given the nature of the statements contained in the Action Request regarding the side effects of Complainant's medications.

Additionally, I note that Complainant's brief does not argue that the Smoking Incident, the Hood Incident, and the Shop Clean-Up Day Incident constituted protected activity. Accordingly, I do not address whether these incidents constitute protected activity under the Act.